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Legal History as a History of the Translation of Knowledge of Normativity*

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In the last few years, our research at the department "Historical Regimes of Normativity" at the Max Planck Institute for Legal History and Legal Theory has increasingly been guided by two conceptual ideas: we analyze legal history as a "history of the translation of knowledge of normativity" and we integrate our observations into an analytical framework we call "Historical Regimes of Normativity". The latter – the concept of "Historical Regimes of Normativity" – is explained in a separate working paper (Duve 2022c). This paper introduces the former: our understanding of legal history as a huge historical process of "cultural translation" of what we call "knowledge of normativity" (in German *Normativitätswissen*, in Spanish *saber normativo*).

The reasons for this orientation are manifold and have been explained in various writings (starting with Duve 2012 and advanced especially in Duve 2021a – in Spanish: 2022b – and 2022a; see also Duve 2017, 2020a, 2020b, 2021b, 2021c). They are intimately related to our attempt to write legal history from a "global", non-Eurocentric perspective and to develop an analytical approach for a legal history beyond modernity.

In our aim to develop a sound methodology for doing (global) legal history, we have been drawing on professional expertise from neighboring disciplines. I firmly believe that we are obliged to do so, not because of any general preference for "interdisciplinary" approaches (which are always difficult), but for the sake of our own discipline and its methods. With regard to the concept of "translation", we have learned from scholarship dedicated to translation studies, cultural studies and, not least, legal theory. The focus on "knowledge" of "normativity" (instead of "law" or "legal knowledge") was motivated by the insight that we have to integrate various modes of normativity, and most of all practices (in the way recent praxeological research understands them) into our analysis. In working on such a knowledge-historical approach, we have tried to integrate findings from the (transdisciplinary) field of (historical) knowledge studies, especially the debates in history of science that contributed to the emergence of the broader field "history of knowledge".

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This paper consists of five parts. In a first part, I will sketch out in a very general way our understanding of legal history as a history of the translation of knowledge of normativity (I.). I will then introduce the legal-theoretical foundations of this perspective (II.) and explain some advantages of speaking of "knowledge" and "normativity" and not of "law" and "legal knowledge" (III.). In the final part, I will summarize some intellectual opportunities of using the concept of (cultural) translation (IV.). A brief epilogue connects this paper to the paper on "Historical Regimes of Normativity" (V.).

I. Legal History as the History of the Translation of Knowledge of Normativity: an Overview

1. Understanding legal history as the history of the translation of knowledge of normativity assumes that law is the result of a communicative practice and that the legal order, as well as any other normative orders, is the result of a continuous **social and cultural construction** (cf. on the communicative construction of reality for example Berger/Luckmann 2003; Knoblauch 2017). Even if historical actors may have seen it differently - for instance in the European Middle Ages - normative orders do not simply "exist" but are continuously and creatively produced by a multitude of actors and actants. In this context, what we call "law" represents only part of the normative ensemble. Likewise, state (or proto-state) institutions as well as jurists constitute only a (small) section of the wide circle of its producers.

2. This cultural understanding of law as something constructed necessarily means that legal historical analysis has to **focus on the actors**. This leads to their knowledge, understood in a wide sense: when these actors produce normative statements (a court sentence, a book, a legal opinion, etc.), they are doing this with the help of the knowledge that is at their disposal: knowledge about how to proceed, about the good and the bad, about the existing legal framework, about the persons and problems involved, about power relations, etc.

3. As all actors are living in a concrete environment, their doings and sayings, and as such also the production of, for example, a judgement, is always **socially and culturally situated**. Knowledge is "never pure" (Shapin 2010). Actors are always – to use some keywords of the current debate – part of a "sphere", a "*dispositif*", a "system logic" or an "instituent power", conditioning their actions.[1]

[1] Obviously, the situatedness of law-making has been of interest to legal scholars for centuries. In the 19th century, for example, German legal scholars searched for the "Volksgeist", the "spirit of the people". In the 20th century, these conditions of action, the underlying assumptions, practices, tacit knowledges, etc. have often been addressed in a fairly unspecific way as "legal culture", more interestingly as "legal tradition" (H. Patrick Glenn), as "legal consciousness" (Duncan Kennedy), as "legal knowledge" (James

4. The constructivist approach, the focus on actors and the situatedness of knowledge, necessarily leads to the **local sphere** as the starting point of any observation: all knowledge is localized knowledge. It seems important to emphasize this, given the widespread misunderstanding that "global" history would be opposed to "local" history. The contrary is true: there is a broad consensus that global history is only good if it is good local history (see for example Wenzlhuemer 2017; Duve 2020a) – even if this might not always be the case in daily academic practice.

5. In speaking of "**knowledge**", we are drawing on a vast and multifaceted debate about knowledge.[2] Seen from the resulting knowledge-historical perspective, normative orders emerge and transform in a large diachronic communication process of storing, processing, authorizing and, of course, at the same time forgetting and de-authorizing knowledge (for the distinction between information and knowledge and their use in legal history see Duve 2020b).

6. According to definitions stemming from the vast field of knowledge studies, "knowledge" **comprises discourses, practices, rules, norms and principles**, i.e. explicit and/or implicit knowledge with regard to a certain field of action. More precisely, and in slight modification of definitions of cultural knowledge (see Neumann 2013), one can describe knowledge of normativity as the total set of propositions that the members of an epistemic community explicitly or de facto accept or that a sufficient number of texts posit. It can include both tacit and explicit knowledge and extend to securely accepted facts, conceptual and theoretical constructions, and cultural patterns of thought, orientation, and action. Knowledge of normativity is usually distributed across a variety of different media, actors, and institutions; the concept also considers value systems. Knowledge thus determines the world of what can be thought and said: it shapes and limits the "legal imagination" (Koskenniemi 2021) of the respective epistemic community (or "communities of practice") and its practices (for more details, see Duve 2021a).

7. If the field of action is the production of normative statements, the knowledge thus becomes "**knowledge of normativity**". One might also speak of "legal knowledge", but we prefer the term "knowledge of normativity" for reasons that will be explained below (see III.).

Boyd White), as "legal imagination" (Martti Koskenniemi), or as "instituierende Macht" (Thomas Vesting, translated here as instituent power). We opted to address them as "knowledge of normativity", because this choice connects our concepts with professional expertise in the relevant cultural and social studies.

[2] Historical research has already been dealing more intensively with "knowledge" and its history for several decades (on "social knowledge" in this function, for example, Oexle 1987). In the 1990s and early 2000s, there have been intense and nebulous discussions on "knowledge societies" and, at around the same time, there was also a more complex and profound debate about the transformation of the history of science into the emergence of a history of knowledge. We are drawing on the latter.

If the knowledge of normativity relates to a specific field of action, for example, the creation of dependency, it is knowledge of normativity with regard to dependency.

8. It is extremely important to emphasize that **"knowledge" necessarily includes "practices"**. The so-called "practice turn" was one of the central motives for many historians of science to shift toward knowledge-historical approaches, because these approaches allowed them to integrate the praxeological dimension into their findings (cf. on the discussion, e.g., Daston 2017; Füssel 2019, 2021; Renn 2012, 2014; Sarasin 2011). "Practices" (which obviously are not the same as simple "practice" in the established sense of *Rechtspraxis*) are defined as "repetitive consummations of speech acts and actions in the interplay of things and physical routings of actors, situated in space and time" (Füssel 2021, 92; see on the theory of social practices for example the overview in Schäfer 2013; Reckwitz 2016). Lorraine Daston describes practices simply as "roughly, what scientists actually do as opposed to what they say they do" (Daston 2017, 139).

Thus, in terms of law, "practices" are not the result of a legal methodology or a putting in practice of operationalization rules, i.e. the application of what one might call a "theory of legal practice". Rather, by speaking of "practices", practice theory refers to the rule-like, repetitive executions of actions. These practices are of utmost importance, because they often determine the result, and in many cases they are not made explicit: assumptions and circumstances that seem so natural that they are not even mentioned, or that can only be acquired by doing, *in situ*. In colonial legal history, for example, we often find references to the fact that "things are different" in the colonies, so that "one has to have lived here" or made personal experiences to understand them (on the importance of experience in this context see Egío 2022). To rephrase Daston's expression, we could say that practices are "roughly, what jurists or actors in the legal field actually do as opposed to what they say they do".

9. The process of producing a new normative statement by drawing on extant legal knowledge can be called a "**translation process**", using a terminology established in cultural studies (cf. the overviews in Burke 2007; 2009) and to some extent in jurisprudence (e.g. White 1990; Langer 2004). In this process the knowledge that is assessed and selected as relevant by the actors is related to a concrete field of action. It is culturally translated into the world the translators are living in – into their epistemic communities' mindset.

10. Understanding legal history as a history of the translation of knowledge of normativity has some advantages. Not least, it is a **perspective that helps to analyze change,** because every act of production of a normative statement through translation, i.e. the concretization under certain contexts and for a certain case, simultaneously generates new knowledge of normativity. H.P. Glenn, whose legal theory was an important inspiration for our approach, speaks of a "*continual reflexive process, through looping or feedback*" (Glenn 2005). Knowledge of normativity is thus both a means for and a result of the translation process. In other words,

every process of translation holds creative potential. This is why legal change is possible: it is a consequence of the continuous process of translation of knowledge of normativity, in which the actors process, respond and react to changing conditions and circumstances and thus produce new knowledge of normativity.

II. Pragmatic Understanding of Law and its Consequences

The understanding of legal history as a huge process of cultural translation of knowledge of normativity is based on a "pragmatic" or performative concept of law. What does this mean?

1. While continental European legal historians have been focussing on the history of what one might call (in a Hartian terminology) primary and secondary rules, over recent decades legal scholars have paid more attention to the production of law. Not only the results, like laws and institutions, or the normative framework of institutions like for example courts, but the process of production of these results as such has become of interest. Law is no longer seen as embodied in a hierarchical system of norms, but as the outcome of a complex **communicative process of producing meaning and assigning normativity**. In this wider context, and in related debates in other fields (Law and Literature, for example), law has been called a "craft" (Scharffs 2001), a "cultural competence" (White 2002), a "continual reflexive process, through looping or feedback" (Glenn 2005), or "bricolage" (Koskenniemi 2021). In the last few years, German legal theorists have emphasized the importance of mediality and materiality in this process (e.g. Vesting 2011-2016; Vismann 2000).

2. Behind all these descriptions is a **pragmatic or performative understanding of norms**. This is a result of a growing discontent with classical legal methodology, of a reception of deconstructivist and performative theories in legal scholarship, of the understanding of law as communication, of procedural theories of law, to name but a few aspects (see for a summary Müller-Mall 2012; Lerch 2016; Kuntz 2016; Buckel et al. 2020).

3. Such a pragmatic or performative understanding of norms is fraught with **consequences for research in legal history**. From this perspective, legal historians cannot limit themselves to reconstructing law as a system of norms (as it has been the case in many European historiographic traditions) or as a history of legal dogmatics, but instead must make the processes of norm production their subject. At the same time, this means that one cannot distinguish between "norm" and "application" or "practice": norm production is a social practice, and the manifold forms of practice (forensic, scientific, laymen's, etc.) of different epistemic communities participate therein. However, since any practice is knowledge-led, we need to reconstruct the knowledge of normativity upon which actors rely in producing a normative

statement. Just describing what actors are doing, without relating this to the larger communicative process, is not sufficient.

4. It is in this context that the notions of "**epistemic communities**" and/or "**communities of practice**" gain special relevance. In general terms, the complex debates about these concepts in International Relations, International Law, and History and Sociology of Science (see for example Haas 2012; Valleriani et al 2019; Cardenas/d'Aspremont 2020) notwithstanding, epistemic communities (and/or communities of practice) can be defined as networks of knowledge-based communities with an authoritative claim to relevant knowledge within their domains of expertise. The members of an epistemic community share principled beliefs, causal beliefs or professional judgement, common notions of validity, and a set of practices associated with a central set of problems that have to be tackled (the definition is following, with slight adaptations to legal historical needs, Haas 2016, 5). These epistemic communities can be located in the same place or distributed in space. An example of such an epistemic community could be the so-called School of Salamanca, rightly understood as a network of scholars working in different places mainly within the Iberian early modern empires, and not only in Salamanca. They can be observed as an epistemic community because they share certain academic practices and principal beliefs – even if they might reach different conclusions with regard to specific questions (Duve 2020b, 2021b).

III. "Knowledge of Normativity" vs. "Law" and "Legal Knowledge"

Having summarized the general idea (I.) and the underlying legal theoretical assumptions (II.), it might be useful to ask for the intellectual opportunities and advantages of writing legal history as a history of "knowledge of normativity" and not of "law" or "legal knowledge". A few aspects shall be highlighted.

1. A first advantage of the concept lies in the fact that "knowledge of normativity" draws attention to **multiple forms of knowledge** that in practice are engaged in the production of normativity. Knowledge of normativity includes factual knowledge, consequential knowledge, of course also legal knowledge, practical knowledge, implicit or explicit knowledge, etc. (cf. on the various forms of knowledge from the perspective of jurisprudence Hoffmann-Riem 2016, 307ff. as well as various contributions in Augsberg/Schuppert 2022, especially Collin 2022). Much of this is what David Daube referred to as the "self-evident in legal history" (Daube 1973) and what often escapes the legal historian's attention. All this might not seem relevant from a legalist's point of view. But it is especially important if we analyze the production of law, or if we try to understand normative orders based on performance, for example, early modern Iberian "jurisdictional cultures" (Agüero 2007; Garriga 2019).

2. The term refers to **different spheres of normativity** that are mobilized in the production of a concrete normative statement. It refers to knowledge concerning social norms, conventions, and routines – and it includes practices. Speaking of "knowledge of normativity" thus enables the integration of knowledge from the sphere of religion in a legal-historical analysis, which is crucial for example for the colonial history of Latin America (cf. Duve/Egío 2022). In a similar manner, rules of the game, knowledge about ceremonial rules etc. have their firm place in a legal-historical method (e.g. Vec 1998; Stollberg-Rilinger 2008). Aesthetic norms can also be integrated into the analysis (Damler 2017).

3. These and many other norms are comprised in the term "**multinormativity**" (cf. Vec 2009), especially in its more specific use as an analytical tool to integrate practices into a legal-historical analysis (Duve 2017). However, the terminology of the history of knowledge offers the advantage that it refers quite explicitly to a consolidated theoretical tradition of reflecting on practices. It also avoids some misunderstandings the term "multinormativity" has triggered, due to the usual juxtaposition of "norm" and "practice".

4. The broadness of the term "knowledge of normativity" carries risks, but at the same time makes it particularly **useful for comparative and global-historical work**. The term avoids the fixation on a certain understanding of "law", from which other modes of normativity then would be differentiated as "non-law", "custom", etc. And it can be used to integrate entirely different forms of knowledge of normativity (e.g. religious knowledge) as well as embracing entirely different forms of norm creation (such as those of spiritual inspiration). A knowledge-historical perspective is therefore an important method for a global legal history of which the central concern is the de-Europeanization and de-colonization of concepts and methods (Duve 2012, 2020a).[3]

IV. Translation

Why do we now analyze the production of knowledge of normativity as a process of (cultural) "translation"? Some reasons and advantages seem worth highlighting (on the conception of translation in more detail, see Duve 2012):

1. Any analysis of "translation", understood as cultural translation (which, of course, can also be lingual translation), assumes the positionality and focuses on the knowledge resources of the one who performs the translation. It thus **imposes a local perspective**, because any reconstruction of the process of the production of norms etc. must start therefrom. Knowledge

[3] Obviously, there are obstacles to finding a metalanguage for comparison, perhaps even unsurmountable ones, see Steinmetz 2019, Chakrabarty 2000.

resources, mediality, interactions, and global contexts can only be reconstructed adequately from concrete processes of translation. The method thus ideally leads to a "radical contextualization" and attention to concrete constellations. It combines well with the priority of the local perspective that the legal-theoretical fundaments of our concept require and with the emphasis on the local in knowledge studies.

2. By prioritizing the local, we deliberately privilege a perspective that is meant to help **guard against the essentialist tendencies** of established terms such as "reception", "transfer", or "transplant", which still primarily examine the "circulation", "travel", or "transfer", etc. of "something" — although terms and ideas themselves certainly cannot travel. In doing so, this perspective can connect with specific reflections from translation studies and import its theoretical advances into legal history.

3. Seeing legal history as a process of translation is an important building block of a global legal-historical method and, in its connection with the notion of "glocalization", can also **leave behind the binary division of "local" vs. "global"** and capture processes of decentralized knowledge production and their stabilizing effect on the normative orders under analysis (cf. on glocalization etc. Duve 2020a).

4. This perspective has the advantage that power relations, socio-economic foundations, distributions of power, aesthetic categories, social markings, patterns of interpretation, etc. can be included in the analysis as **circumstances and conditions of the process of translation**. One can analyze, for instance, how epistemic hierarchies, such as the question of which media were accessible to the actors, due to individual situations, cultural preferences, or cognitive hegemonies (e.g. because of the dominance of certain legal languages due to a colonial past or present) impacted on the process of translation.

5. By asking how these factors have affected the translation of knowledge, one does not simply observe them as external factors. Rather, one can **analyze how these "non-legal factors" are processed and operate in the legal system** (in a broad sense). In this way, legal history can overcome the reductionist and misleading but persistent distinction between "external" and "internal" legal history, and thus contribute to an integration of "general" and "legal" historical perspectives.

6. Looking at the production of knowledge of normativity as a process of translation, it becomes apparent that knowledge of normativity is both stable and unstable, because with every act of selection and concretization of a norm under certain circumstances and for a certain purpose, new knowledge of normativity is created. The knowledge of normativity produced in this way may deviate from the previous knowledge and is available for new acts of translation. Understanding legal history as the history of the production of knowledge of normativity through translation thus makes it possible to **observe the "dialectic" of stability and change**.

V. Epilogue

The analysis of stability and change must be a special concern of (legal) historical research. In order to analyze stability and change, however, the many individual observations of acts of translation of knowledge of normativity must be embedded in an analytical framework. Traditionally, legal historians have taken certain periods, spaces or historical phenomena such as nations as the units of comparison. However, this is not without problems, so that we decided to integrate our observations into an analytical framework we call "Historical Regimes of Normativity". This will be introduced in a different research paper (Duve 2022c).

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